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In The

Supreme Court of the United States

October Term, 1975

No. 75-190

GREGORY VAN HALL,

Petitioner,

v.

THE COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to a judgment of May 7, 1975, of the Supreme Court of Virginia not to grant a Writ of Error not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia not to grant a Writ of Error is not reported.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. **Is A Defendant Entitled In A Probation Revocation Hearing In Which There Are Factual Disputes To A "Full Panopy Of Procedural And Substantive Rights"?**

II. **Is The Standard Of Proof In A Probation Revocation Hearing That Of Proof Beyond A Reasonable Doubt?**

III. **Was The Evidence Sufficient For Revocation Of Probation?**

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 13, 1973, the Petitioner was heard in the Circuit Court of the County of Albemarle, Virginia, on charges that he had violated the terms and conditions of probation. The Court did not revoke probation but instead placed the Petitioner again under stringent terms and conditions of probation designed to separate him from drugs and from people associated with drugs.

The Petitioner, again having been charged with violation of terms and conditions of probation, was brought before the Court on July 24, 1974. There was testimony to the effect that Petitioner's life-style was consistent with individuals associated with drugs, that the Petitioner owned an aggressive dog, again not inconsistent with the use of

drugs, and that the Petitioner had had difficulties in holding his employment.

The Court referred to the terms and conditions of probation imposed on the Petitioner in the hearing held on September 13, 1973, found those terms and conditions to have been violated, and revoked Petitioner's probation.

I.

A Defendant Is Not Entitled In A Probation Revocation Hearing In Which There Are Factual Disputes To A "Full Panopy Of Procedural And Substantive Rights."

Petitioner alleges that a probation revocation hearing in which there are factual disputes relating to the grounds of revocation is transformed from a quasi-criminal administrative hearing into a "full judicial hearing" and that the defendant is entitled to a "full panopy of procedural and substantive rights."

Petitioner is not entitled to raise the issue. The same was not raised at the trial court level. It, therefore, cannot be assumed that the Supreme Court of Virginia considered the issue. Rule 5.7, *Rules of the Supreme Court of Virginia, 2 Va. Code Ann.* (Cum. Supp. 1975), provides in pertinent part as follows:

> This Court will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. . . .

If a party has not given the opportunity to a State trial court and the State appellate court to consider the issue, he is not entitled to be heard in this Court on a Petition for a Writ of Certiorari. *Trailmobile Co.* v. *Whirls,* 331 U.S. 40

(1947); *Ellis* v. *Dixon,* 349 U.S. 458 (1955), *reh. den.* 350 U.S. 855 (1955).

Even if Petitioner were entitled to be heard on the issue, the same is so vague as to not form a basis upon which a decision could be made.

In *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), this Court in considering the issue of applicability of due process procedural safeguards in parole revocation hearings stated in 408 U.S. at p. 480 as follows:

> "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panopy of rights due a defendant in such a proceeding does not apply to parole revocation. [Authority cited] Parole arises after the end of the criminal prosecution, including imposition of sentence. . . ."

This Court has generally taken the view that revocation of parole and revocation of pardon are essentially the same. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973). Thus, this Court conclusively has taken the position that an individual is not entitled to a full panopy of procedural and substantive rights in probation revocation proceedings.

Petitioner is not entitled to raise the issue that a Defendant is entitled in a probation revocation hearing in which there are factual disputes to a full panopy of procedural and substantive rights. Even if he were so entitled, this Court has decided the issue adversely to Petitioner.

II.

The Standard Of Proof In A Probation Revocation Hearing Is Not That Of Proof Beyond A Reasonable Doubt.

Petitioner raises the issue of whether the standard of proof in a probation revocation hearing is that of proof beyond a reasonable doubt.

Petitioner should not be heard on that issue. Not only did he not raise the same in the State trial Court, he, in closing argument, agreed that the standard of proof was not that of proof beyond a reasonable doubt:

> "There is not one thing on here that there is any direct evidence, any direct evidence other than the assumption by Mr. Wade Your Honor in this Court—there is not one centiliter (sic) of evidence before you today that there has been a breach of any one of these conditions, that he hasn't met all of them, not one. What you have got to do in order to find them guilty and to revoke his probation, you have go to believe the flavor of what Mr. Wade tells you rather than any evidence presented by Mr. Hall. *Now it seems to me—I know that this sort of a hearing does not have the same requirement, reasonable doubt burden and so forth,* Your Honor when there isn't one centiliter (sic) of evidence that's contrary, to anything that's here, there's not anything about associates. . . ." (Emphasis supplied) (Trial Transcript p. 92)

The issue, therefore, should not be heard before this Court. *Trailmobile Co., supra,* and *Ellis, supra.*

In any event, the burden of proof necessary for revocation of probation is not that of proof beyond a reasonable doubt. To hold that proof beyond a reasonable doubt is necessary would be to hold that a probation revocation hearing is a part of a criminal prosecution. Probation comes subsequent to the culmination of criminal prosecution and is not a part of the prosecution. It has been held that proof beyond a reasonable doubt is not necessary in order to revoke probation.

U.S. v. *Lauchli,* 427 F.2d 258 (7th Cir. 1970), *cert. den.* 400 U.S. 868 (1970); *State* v. *Rasler,* 216 Kan. 292, 532 P.2d 1077 (1975); 24 C.J.S. § 1618(11), p. 916. It has

been held in Virginia that proof beyond a reasonable doubt is not necessary in order to revoke probation. *Marshall* v. *Commonwealth*, 202 Va. 217, 116 S.E.2d 270 (1960).

Petitioner is not entitled to raise the issue of whether the standard of proof in probation revocation hearings is that of proof beyond a reasonable doubt. Even if he were so entitled, the weight of authority supports the view that proof beyond a reasonable doubt is not necessary in such hearings.

III.

The Evidence Was Sufficient For Revocation Of Probation.

Petitioner alleges that the evidence was insufficient for revocation of probation. There was ample evidence upon which to justify revocation of probation.

The Court had previously held a probation revocation hearing on September 13, 1973. The Court found as a fact from the evidence that the Petitioner's problems had been drug-related. Rather than revoking probation, however, the Court again placed the Petitioner on probation, subject to strict conditions designed to separate him from drug-related activities and persons associated with drugs. The Court specifically required the Petitioner to maintain a job approved by it and to present himself in Court at least once every three months "from the standpoint of your personal appearance for the approval of the Court." (Tr. 3, transcript of portion of hearing held on September 13, 1973). The Court also specified additional conditions. (Tr. 4-5, transcript of portion of hearing held on September 13, 1973). It is obvious from the Court's remarks and conditions that the whole intention of the Court was to make one last attempt to keep the Petitioner away from any circumstance which might in any way lure him into the use of drugs again.

There was evidence to the effect that the Defendant was having difficulties at work. (Tr. 5-6, hearing held on July 24, 1974). There was evidence that the Petitioner's physical appearance was consistent with individuals involved in drugs, specifically, his dress, hair and beard. (Tr. 4, hearing held on July 24, 1974). The Petitioner also owned a dog which had to be brought under control before the probation and parole officer entered the premises of the Petitioner, and there was evidence that ownership of such a dog again was consistent with the life-style of individuals involved in drugs. (Tr. 4-5, of hearing held on July 24, 1974).

There was additional testimony that the premises in which the Petitioner lived were characteristic of a "drug type pad," and that specifically musk oil, commonly used to conceal the odor of drugs was present. (Tr. 17, hearing held on July 24, 1974).

There was sufficient evidence upon which to base revocation. The Court had earlier placed the Petitioner under strict conditions designed to separate him from drugs and from those who used drugs. Evidence presented showed that the Petitioner failed to abide by the conditions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, counsel for the Respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 14th day of November, I mailed three copies of the foregoing Brief in Opposition to the granting of a Petition for a Writ of Certiorari to Robert P. Dwoskin, 1224 West Main Street, Charlottesville, Virginia 22903, Attorney for Petitioner.

LINWOOD T. WELLS, JR.
Assistant Attorney General